No. 9251

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES A. ACKROYD, DWIGHT S. BRIGHAM, MORRIS F. LACROIX, EARLE L. CARTER, J. EDWARD STEVENS and FRANK E. NELSON,
Appellants,

vs.

WINSTON BROTHERS COMPANY (a corporation),
Appellee,

and

BRADY IRRIGATION COMPANY (a corporation),
Appellant,

vs.

WINSTON BROTHERS COMPANY (a corporation),
Appellee.

BRIEF OF APPELLANTS, JAMES A. ACKROYD, DWIGHT S. BRIGHAM, MORRIS F. LACROIX, EARLE L. CARTER, J. EDWARD STEVENS, AND FRANK E. NELSON.

STERLING M. WOOD,
ROBERT E. COOKE,
FREDRIC MOULTON,
Security Building, Billings, Montana,
Attorneys for Appellants, James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens, and Frank E. Nelson.

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STATEMENT OF THE PLEADINGS AND JURISDICTIONAL FACTS.

This action was instituted in the District Court of the United States for the District of Montana by Ap-

pellant Brady Irrigation Company, a corporation, as Plaintiff, against the Appellee Winston Brothers Co., a corporation, Teton Co-Operative Reservoir Co., a corporation, and Bynum Irrigation District a public corporation, as Defendants. The bill of complaint (also denominated a petition for declaratory judgment) (Tr. 3) alleges the requisite diversity of citizenship. The controversy, as disclosed by the bill of complaint, is between the Appellant Brady Irrigation Company, a citizen and resident of the State of Montana, and the Appellee, a citizen and resident of the State of Minnesota. The remaining Defendants, citizens and residents of the State of Montana, were named Defendants, pursuant to Equity Rule 37, by reason of their refusal on demand to join as Plaintiffs in the prosecution of the suit. The prayer of the bill of complaint is, substantially, for a declaratory judgment that the Appellee under a certain judgment obtained by it in a Montana state court, has no lien upon or right to sell certain real estate in which Brady Irrigation Company and Teton Co-Operative Reservoir Co., as well as Bynum Irrigation District, have an interest. That real estate is necessarily used as a reservoir, dam-site, etc., to supply the three last named corporations with water for irrigation purposes.

The Appellants James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens and Frank E. Nelson, *hereinafter referred to as the Appellants, Ackroyd, et al.,* intervened by leave of court and joined the Appellant Brady

Irrigation Company in a demand for a declaratory judgment. The said Appellants Ackroyd, et al., are non-residents of the State of Montana and have a substantial interest in the matter in controversy in that certain bonds owned by them, aggregating $923,000 of principal, and issued by Bynum Irrigation District would be rendered worthless if the Appellee were permitted, under its said state court judgment, to sell the real estate of Teton Co-Operative Reservoir Co. upon which a lien by virtue of that judgment is claimed. That real estate is an essential part of an irrigation system that provides the only source of water supply for the irrigation of lands in Bynum Irrigation District, to which lands the Appellants Ackroyd, et al. must look for the payment of their bonds. Without water from such irrigation system those lands would be practically worthless.

The Appellee attacked the bill of complaint of Brady Irrigation Co. and the bill of intervention of the Appellants Ackroyd, et al., by separate motions to dismiss which were sustained and thereupon judgment of dismissal of the action was rendered. The action has been treated at all times as one for equitable relief by declaratory judgment.

The jurisdiction of the District Court of the United States for the District of Montana is based on U. S. Codes, Title 28, Section 41, subdivision 1, which provides that such court shall have original jurisdiction where the matter in controversy, exclusive of interest and costs, exceeds the sum or value of $3,000 and is between citizens of different states.

The jurisdiction of this court is based on U. S. Codes, Title 28, Section 225, which provides that the Circuit Courts of Appeals shall have appellate jurisdiction to review by appeal final decisions of the district courts.

STATEMENT OF THE CASE.

The following is a resume, made as brief as possible, of the facts pleaded in the bill of intervention. The Appellants Brady Irrigation Company and Ackroyd, et al., have appealed separately (Tr. 95 and 98) from the judgment (Tr. 94) dismissing the action and, by separate briefs, will present their several contentions in this court. This statement of the case relates only to the bill of intervention of the Appellants Ackroyd, et al. and to the contentions of such Appellants.

Inasmuch as the action was disposed of in the trial court upon motions to dismiss, the allegations of the bill of intervention of the Appellants Ackroyd, et al., must be taken as admitted for the purposes of this appeal.

Payne v. Central Pacific Ry. Co., 255 U. S. 228, 65 L. Ed. 598 and 601.

Bynum Irigation District is a *public* corporation of the State of Montana. It has been engaged in business as a public irrigation district ever since on or about the year 1925, and, primarily, to provide lands within the district with water to irrigate the same. On July 1st, 1925, Bynum Irrigation District issued, negotiated

and sold its 6% gold bonds, aggregating the principal amount of $1,000,000, and the Appellants Ackroyd, et al., own $923,000 of the principal amount of those bonds, none of which has been paid.

Teton Co-Operative Reservoir Co. is a Montana corporation which was organized primarily to make water appropriations under the laws of Montana and to distribute water for the irrigation of lands within the state. That company has made appropriations of water, has constructed a reservoir into which waters have been diverted and impounded and has distributed water therefrom to large tracts of land for irrigation purposes, in the conduct of its business. The said Teton Co-Operative Reservoir Co. has acquired and owns real estate in Teton County, Montana, upon which it has constructed improvements, consisting of the aforesaid reservoir, embankment for the same, dams, headgates, canals, and all other necessary structures for the proper diversion, impounding and distribution of water for irrigation purposes, and all of such real estate and the appurtenances are needed by the company for the conduct of its business. Furthermore Teton Co-Operative Reservoir Co. has engaged in no other business than the appropriation, diversion, impounding and distribution of water for the irrigation of lands, and *that business has been conducted at all times without profit to the said company or its stockholders, water having been distributed by the company at the actual cost of the service and for the use of its stockholders and no other persons whomsoever.* Each share of capital stock of Teton Co-

Operative Reservoir Co. represents the right of the owner thereof to an undivided one-thousandths part of water appropriated, impounded and distributed by the company and the ownership of a right to such water for the irrigation of lands. It should be particularly noted that *Teton Co-Operative Reservoir Co. has been operated at all times since its organization:*

> *"Only as an instrumentality or agency of its stockholders* for the appropriation, impounding and distribution of water for the irrigation of lands." (Tr. 64.)

In 1925 Bynum Irrigation District was wholly without water for the irrigation of lands within its boundaries, and then acquired, from the proceeds of the aforesaid million dollar bond issue, 804 shares of the capital stock of Teton Co-Operative Reservoir Co. to the end that Bynum Irrigation District might acquire an adequate supply of water for the irrigation of lands within the district. These 804 shares constitute 80.4% of the issued and outstanding capital stock of the said Company. Before this stock purchase was consummated the right of Bynum Irrigation District to thus provide itself with water for irrigation purposes was tested by a case, brought by one Thaanum, that went to the Supreme Court of Montana. That court, by its final decision, sanctioned the purchase of the stock of Teton Co-Operative Reservoir Co. and declared that the district had the power and authority to make the purchase. The said court in its decision sustained the action of Bynum Irrigation District, in the acquisition of a water supply

through the purchase of stock, and by virtue of a state statute which gave the district the "power * * * to acquire by purchase, lease, or contract, water and water rights", etc., but that statute did not in terms mention such a stock purchase as the District made.

Ever since 1925 Bynum Irrigation District, as the owner of 804 shares of the capital stock of the Teton Co-Operative Reservoir Co., has controlled that company and its business and affairs and has operated the company for the use and benefit of Bynum Irrigation District and the few remaining stockholders of the company, the latter holding only 19.6% of its stock.

The lands within Bynum Irrigation District would be arid and dry and have negligible value without the water and water rights acquired by the purchase of the capital stock of Teton Co-Operative Reservoir Co., and the value of such lands without such water would be wholly insufficient to enable Bynum Irrigation District, by the assessment of the lands, to pay the bonds of the Appellants Ackroyd, et al., or any substantial portion thereof.

In 1927 the Appellee acquired from Teton Co-Operative Reservoir Co. the latter's promissory note which represented an indebtedness incurred in and about the conduct of its corporate business and affairs. At the time the indebtedness was incurred, and when the promissory note mentioned was executed and delivered, the Appellee then and there well knew that Teton Co-Operative Reservoir Co. was the instrumentality and agency through and by which Bynum Irrigation District supplied water for irrigation pur-

poses to lands in the district and that the District had no other means of supplying water to the same. It is also alleged in this connection in the bill of intervention of the Appellants Ackroyd, et al., that the Appellee then knew all of the other matters and things above mentioned in this resume, and pleaded in the said bill of intervention.

The Appellee brought an action upon the promissory note mentioned and recovered a judgment against Teton Co-Operative Reservoir Co. in a Montana state district court. As a result Appellee claims a lien under the judgment upon the real estate above-mentioned, held by Teton Co-Operative Reservoir Co., and necessarily used for the impounding and distribution of water and for the irrigation of lands in Bynum Irrigation District. Appellee further claims the right, under the judgment, to levy upon such real estate by writ of execution and to cause the same to be sold at sheriff's sale and to deprive Teton Co-Operative Reservoir Co. and Bynum Irrigation District of the property, all of which said property is indispensable to the operation of Bynum Irrigation District as a public corporation and to the delivery of water for irrigation purposes to the lands in the said District.

It is finally alleged in the bill of intervention that the claims of the Appellee are without right, that a sale of the aforesaid real estate under execution would jeopardize and destroy the rights and liens of the Appellants Ackroyd, et al. under their bonds, and that the Appellee is without right to cause the said real

estate, or any part of it, to be sold under the judgment or under any writs of execution issued thereon.

It is on the basis of the foregoing facts, pleaded in the bill of intervention, that the Appellants Ackroyd, et al., claim the right, as intervenors, to join with the Appellant Brady Irrigation Company, and to have a declaratory judgment rendered (a) that the Appellee is without right under its judgment against Teton Co-Operative Reservoir Co., or under any writs of execution issued thereon, to sell, either at sheriff's sale or otherwise or at all, any of the real estate of the said Teton Co-Operative Reservoir Co. and (b) that the Appellee has no lien under the said judgment upon the said real estate. There is also a prayer for general relief.

In substance the Appellants Ackroyd, et al. take the position here, as in the trial court, that the public character of the real estate involved, in which Teton Co-Operative Reservoir Co. has but a bare legal title, is such that it may not be sold under the judgment obtained by the Appellee. The only remedy the Appellee may invoke is mandamus, under the former practice in the Federal courts, to compel the district to levy charges as taxes, like any other public corporation, and thereby, through collection of such taxes, to raise its proportionate part of the money required to pay the judgment. There is a liability also on the part of the few remaining stockholders of Teton Co-Operative Reservoir Co. that can be enforced against them. But it would be against public policy, contrary

to settled law, and without warrant of any state statute, for the Appellee to dispose of the real estate of Teton Co-Operative Reservoir Co., by sale under the judgment, since such a sale would make it wholly impossible for Bynum Irrigation District to exist and function as a *public corporation.*

SPECIFICATION OF ERRORS.

Specification of Error No. 1.

The trial court erred in granting the motion to dismiss of the Appellee Winston Brothers Co., a corporation, directed at the bill of intervention of the Appellants Ackroyd, et al.

Specification of Error No. 2.

The trial court erred in rendering and entering its final judgment of April 14th, 1939, dismissing this action.

ARGUMENT.

I.

PRELIMINARY AND BASIC QUESTIONS.

Before arguing the contention that the real estate involved is neither subject to lien nor sale under the judgment obtained by the Appellee, there are certain basic questions in the case that should be settled. Thus:

(A)

THE PUBLIC CHARACTER OF THE PROPERTY INVOLVED.

It is alleged in the bill of intervention, and, hence, admitted for all purposes on this appeal, that Bynum Irrigation District, is a *public* corporation, duly created, organized and existing as such under the provisions of Chapter 146, Laws of Montana, 1909, and the acts amendatory thereof and supplemental thereto, and that ever since on or about the year 1925 the said District has been engaged in business as an irrigation district and primarily to provide the lands within the district with water to irrigate the same. (Tr. 59.) Chapter 146 mentioned is embraced in the irrigation district statutes now found in the 1935 Civil Code of Montana. Section 7169 thereof, in its final paragraph, reads as follows:

> "Every irrigation district so established hereunder is hereby declared to be a public corporation for the promotion of the public welfare."

Section 7201 provides:

> "The use of all water required for the irrigation of the land of any district formed under the provisions of this act, together with the rights of way for canals and ditches, sites for reservoir, and all property required in fully carrying out the provisions of this act, is hereby declared to be a public use."

In Section 7262 it is declared that:

> "The object of this act being to secure the irrigation of lands of the state, and thereby to promote the prosperity and welfare of the people, its

provisions shall be liberally construed so as to effect the objects and purposes herein set forth."

This statutory law establishes clearly the very public character of Bynum Irrigation District. *Any property necessarily used by it for irrigation district purposes would be public property, and, plainly, the character of ownership thereof, if authorized by law, does not affect its public character.*

In addition to the foregoing statutes it should be noted, too, that under Section 7235, relating to irrigation districts, provision is made for the levy of annual taxes by a district. By Section 7240.1, when the required taxes are not levied by the irrigation district commissioners, the board of county commissioners is required to make the tax levy for the district. In every sense of the word an irrigation district is as much a subdivision of the state for governmental purposes as are cities, towns and school districts. Thus in *Crow Creek Irrigation District v. Crittenden,* 71 Mont. 66, 227 Pac. 63, the court said:

> "An irrigation district organized under the laws of this state does exercise some governmental functions; for example, it may levy taxes * * * which is the exercise of one of the highest prerogatives of sovereignty."

In conclusion in that case the court said:

> "To summarize: An irrigation district is a public corporation organized for the government of a portion of the state and for the promotion of the public welfare. It exercises essential governmental functions, and one of its principal

> officers is the county treasurer. It may not expend its funds without the approval of public officers, and the interest on its bonds is not subject to the federal income tax laws. So far as it was possible to do so the legislature has emphasized its public character and expressed an intention that it shall be relieved of the ordinary burdens which are imposed upon private enterprises. From these considerations we think it is fairly deducible that it was the purpose of the legislature that an irrigation district should be deemed a subdivision of the state within the meaning of Section 4893, Revised Codes."

In *Brown Bros. v. Columbia Irrigation District* (Wash.) 144 Pac. 74, the case is decided upon the general proposition that an irrigation district is a public body and, as the court very aptly says:

> "The power to drain, irrigate, or dyke land might have been given to the counties. If it had been, they would have been exercising a municipal function just as a city does when it paves a limited area or district by special assessments against the property benefited."

In *O'Neill v. Yellowstone Irrigation District, et al.,* 44 Mont. 492, 505 and 506, 121 Pac. 283, the Supreme Court of Montana points out that the so-called "Wright Law" of California is similar in purpose and character to the Montana irrigation district act. That irrigation districts in California are public corporations, quasi municipal corporations, or state agencies, performing governmental functions, is pointed out clearly, in a summarization of the Cali-

fornia authorities on the subject, in the case of *In re Lindsay-Strathmore Irrig. District,* 21 F. Supp. 129 and 134. Among other California authorities cited is that of *In re Madera Irrigation District,* 28 Pac. 272. We quote briefly from that case, to-wit:

> "In determining whether any particular measure is for the public advantage, it is not necessary to show that the entire body of the state is directly affected thereby, but it is sufficient that that portion of the state within the district provided for by the act shall be benefited thereby. The state is made up of its parts, and those parts have such a reciprocal influence upon each other than any advantage which accrues to one of them is felt more or less by all of the others. A legislature that should refrain from all legislation that did not equally affect all parts of the state would signally fail in providing for the welfare of the public."

Continuing, the court in the *Madera Irrigation District* case said:

> "Whether the reclamation of the land be from excessive moisture to a condition suitable for cultivation, or from excessive aridity to the same condition, the right of the legislature to authorize such reclamation must be upheld upon the same principle, viz., the welfare of the public and particularly of that portion of the public within the district affected by the means adopted for such reclamation. Whatever tends to an increased prosperity of one portion of the state, or to promote its material development, is for the advantage of the entire state. * * * The local improve-

ment contemplated by such legislation is for the benefit and general welfare of all persons interested in the lands within the district, and is a local public improvement."

In *Mound City Land & Stock Company v. Miller* (Mo.) 70 S. W. 721, the Court considers the constitutionality and status of drainage districts in the State of Missouri and places them in the same class with irrigation districts in other states. Thus the Court says:

"Levees keep out the water. Irrigation canals bring in the water. Drains take out the water. The public has an interest in each kind of such laws. By keeping out the water, the health of the inhabitants is conserved and the value of the lands increased, and the revenues of the state enhanced. Thus the state is directly interested both for sanitary and financial reasons. The irrigation laws bring in the water and make valuable the arid lands, and thereby enhance their value, and, hence, bring in more revenue to the state. Thus the state has a direct pecuniary interest, although not a sanitary interest."

Continuing the court says:

"California, Pennsylvania, Illinois, Michigan, Ohio and New Jersey have reclamation laws, based upon the same principles as our statute. * * * It is competent for the state to raise up a governmental agency for the enforcement of its police powers and for the purpose of enhancing its revenues and carrying its revenue laws into effect. The agency thus created is an arm of the

> state, a political subdivision of the state and exercises prescribed functions of government and is not a private corporation in any sense."

It cannot be gainsaid that Bynum Irrigation District, as a public corporation, carries on a public work for the promotion of the public welfare nor that property necessary to the conduct of that work is used for public purposes.

(B)

THE EFFECT OF THE CONTROLLING CASE OF THAANUM v. BYNUM IRRIGATION DISTRICT, 72 MONT. 221, 232 PAC. 528.

It is alleged in paragraph XIII of the bill of intervention (Tr. 64) of the Appellants, Ackroyd, et al.:

> "That Bynum Irrigation District was organized for the purpose of irrigating large tracts of land in Teton County, Montana, and that on or about the year 1925 the said Bynum Irrigation District, being wholly without water for the irrigation of such land, made and entered into an agreement to purchase, for a consideration of $500,000, payable from the proceeds of the $1,000,000 bond issue * * * 804 shares of the capital stock of * * * Teton Co-Operative Reservoir Co., being 80.4 per cent of the issued and outstanding capital stock of the said Company, to the end that thereby the said Bynum Irrigation District might acquire an adequate supply of water for the irrigation of the lands within the said District."

As the statement of the case herein makes plain Teton Co-Operative Reservoir Co. holds the legal title to the real estate involved in this action which the Appellee threatens to sell under its judgment. That

real estate is necessarily used by the said Teton Co-Operative Reservoir Co. for the diversion, impounding and distribution of water for irrigation purposes.

It is further alleged in said paragraph XIII (Tr. 65) of the said bill of intervention that:

> "On or about the year 1925 one W. A. Thaanum, an owner of land in the said District (meaning the Bynum Irrigation District), instituted a certain action to restrain the said District and its Board of Commissioners from expending any money belonging to the said District for the purchase of the said 804 shares of capital stock above mentioned, and that thereafter in the said action, and on or about the year 1925, the Supreme Court of the State of Montana duly adjudged that the said District and its said Board of Commissioners, * * * had the power and authority to purchase the said 804 shares of capital stock of Teton Co-Operative Reservoir Co., and that the judgment rendered is in full force, virtue and effect."

The Thaanum action is the one cited in the foregoing caption to this argument. The Supreme Court of Montana sanctioned the purchase of shares of the capital stock of the Teton Co-Operative Reservoir Co. and did so by virtue of the provisions of subdivision 3, Section 7174, Revised Codes of Montana, 1921, as amended by Chapter 157, Laws of Montana, 1923. This circumstance is pleaded in the bill of intervention and has been admitted with the other facts pleaded, supra. The statute mentioned provides in substance that the board of an irrigation district shall have power and authority to acquire by purchase,

lease, or contract, water and water rights, rights of way for reservoirs, the storage of needful waters, dam sites and appurtenances, and such other lands and property as may be necessary for the operation of any district system of irrigation works. It should be borne in mind in this connection that, when this purchase of stock was made, Bynum Irrigation District had no water rights of any sort for the irrigation of lands in the district, and, hence, that the purchase of such stock was necessary to enable Bynum Irrigation District to function as a public corporation.

The following further allegations of the bill of intervention of the Appellants Ackroyd, et al., that have been admitted, should also be noted, to-wit:

> "That the said Company (meaning Teton Co-Operative Reservoir Co.) has been operated at all times since its organization only as an instrumentality or agency of its stockholders for the appropriation, impounding and distribution of water for the irrigation of lands." (Tr. 64.)
>
> "That the said capital stock of the said Teton Co-Operative Reservoir Co. so purchased as aforesaid, constitutes and is the sole source of water supply for the said Bynum Irrigation District and is indispensable, in its entirety, to the conduct of the business of the said Bynum Irrigation District as a public corporation." (Tr. 65 and 66.)
>
> "That upon the purchase of the said shares of capital stock of Teton Co-Operative Reservoir Co. the said Bynum Irrigation District and its Board of Commissioners duly apportioned water for irrigation among the lands in the district, as

required by law, and in a just and equitable manner, being the water acquired by the purchase of the said stock, and that such water thereupon became, ever since has been and now is appurtenant to such lands and inseparable from the same." (Tr. 66.)

"That ever since on or about the year 1925 the said Bynum Irrigation District, as the owner of the aforesaid 804 shares of capital stock, and through its Board of Commissioners, has controlled the said Teton Co-Operative Reservoir Co. and its business and affairs, and has operated the said Company for the use and benefit of the said Bynum Irrigation District and the other stockholders of the said Company." (Tr. 67.)

Since Bynum Irrigation District necessarily acquired the water stock in question and had the legal right so to do, that stock and all it represents, namely, the irrigation system involved, became *public property* in every sense of that term. There is no difference in fact or in law, as regards the acquisition of water rights for Bynum Irrigation District, between the purchase of stock of Teton Co-Operative Reservoir Co., with the consequent control of its business and affairs, and the purchase of the irrigation system of that Company, consisting of the real estate here involved and the appurtenances. The District could lawfully acquire its water rights by either method. In legal effect, as a result of the *Thaanum* case, the Bynum Irrigation District did acquire the irrigation system of the Teton Co-Operative Reservoir Co. by the stock purchase. The said Company, after the

stock purchase was made, became a mere holding company, agent or trustee, for Bynum Irrigation District. Had the District purchased the irrigation system outright, instead of the stock, no contention could properly be made that the said system is not now used for a public purpose. Nor could any claim be made legitimately under such circumstances that the use of the irrigation system to carry some surplus water (not needed by the District) detracts from the major use of the system for a public purpose by the District. The acquisition of 80.4% of the stock of Teton Co-Operative Reservoir Co., leaving only 19.6% in private hands, creates no different condition in legal effect than if the District had bought the irrigation system and allowed surplus water, to the extent of 19.6% of the entire supply, to go to a few private persons. The law (Sec. 7204, Revised Codes of Mont. 1935) permits a district to dispose of surplus water.

It is also proper in this connection to contend, as we do, that the *water rights,* which, under the *Thaanum* case, Bynum Irrigation District acquired by purchasing a controlling stock interest in the Teton Co-Operative Reservoir Co. are owned by Bynum Irrigation District. The statute construed in the *Thaanum* case authorizes the district to acquire water and water rights. While the law provides, in Section 7202, Revised Codes of Montana, 1935, that the *amount of water* that can be beneficially used on each tract of land in an irrigation district and that has been apportioned to the same by the district commissioners "shall become and shall be appurtenant to

the land and inseparable from the same", nevertheless the *water right* itself, as property, is owned by the District, as the following irrigation district statutes make clear, to-wit:

(a) Sec. 7174, Par. 3, R. C. Mont. 1935, authorizes a district to acquire "water rights"; (This is the statute construed in the *Thaanum* case.)

(b) Sec. 7204 permits all surplus water "belonging" to a district to be sold by the district; and

(c) Sec. 7217 (in the original irrigation district act but now repealed) provides that the report of the irrigation district bond commission shall give the value of the *water rights* "owned" by a district.

Water rights, of necessity, do not exist apart from but rather by virtue of the dams, ditches, reservoirs, etc., that, after appropriation of water, bring about the diversion thereof and its resultant beneficial use. Thus, the irrigation system of Teton Co-Operative Reservoir Co. comprises part of the "water rights" now owned by Bynum Irrigation District. Those water rights are *public property* necessarily used by the public corporation in question.

Attention should be called to one more controlling authority. It is the case of *Brady Irrigation Company v. Teton County, et al.,* 107 Mont. 330, 85 Pac. (2d) 350. There the effort had been made by the taxing authorities of Teton County, Montana, to tax

the irrigation facilities of Teton Co-Operative Reservoir Co. that are involved in the suit at bar. Judgment was rendered in the *Teton County* case, and affirmed on appeal, enjoining the issuance of a tax deed to such irrigation facilities. The court brushed aside the veil of the corporate identity of Teton Co-Operative Reservoir Co. and held that the irrigation facilities held by that non-profit corporation were not subject to taxation. In effect it recognized that the irrigation system, that Appellee here claims the right to levy upon under execution, is but part of the water rights owned by Bynum Irrigation District when it said: "They (the ditches, etc.) have no independent use"; that is, a use independent of the lands in Bynum Irrigation District, etc., that use the irrigation water provided by the irrigation system.

The lower court in its decision has disregarded the basic principles settled in the foregoing subdivisions of the argument. Applying those principles, as must be done in a proper disposition of this case, it will follow, under the argument and authorities, infra, that the said real estate may not be sold under the judgment of the Appellee and that the judgment does not create a lien upon the real estate. No question of *exemption* from execution is involved. The statutes of Montana simply do not confer the right to a lien or to a levy by execution against public property owned and used as is the aforesaid real estate.

II.

AS TETON CO-OPERATIVE RESERVOIR CO. IS A MERE TRUSTEE OF THE REAL ESTATE INVOLVED IN SUIT AND WITHOUT ANY BENEFICIAL INTEREST THEREIN, SUCH REAL ESTATE IS NOT SUBJECT TO LEVY UNDER EXECUTION.

Again we stress the allegations of the complaint of intervention, admitted by the motion to dismiss, that:

> "Teton Co-Operative Reservoir Co. has engaged in no other business than the appropriation, diversion, impounding and distribution of water for the irrigation of lands, and that such business has been conducted at all times without profit to the said company or its stockholders; that water has been so distributed by the said company at the actual cost of the service and for the use of its stockholders and no other persons whomsoever; * * * that at all times since the organization of the said company the said capital stock has evidenced the ownership of a right to water for the irrigation of land * * *; and that the said company has been operated at all times since its organization only as an instrumentality or agency of its stockholders for the appropriation, impounding and distribution of water for the irrigation of lands." (Tr. 63 and 64.)

> "That ever since on or about the year 1925 the said Bynum Irrigation District, as the owner of * * * 804 shares of capital stock, and through its board of commissioners, has controlled the said Teton Co-Operative Reservoir Co. and its business and affairs, and has operated the said company for the use and benefit of the said Bynum Irrigation District and the other stockholders of the said company." (Tr. 6.)

In other words, Teton Co-Operative Reservoir Co., under the admitted facts in the case at bar, is but a trustee holding a naked legal title to the irrigation system that supplies water to Bynum Irrigation District, and the entire beneficial interest in those water facilities is vested in the holders of stock of Teton Co-Operative Reservoir Co., which include Bynum Irrigation District that holds 80.4% of such stock.

In 21 Am. Jur., Executions, Par. 428, it is said:

> "It is not every legal interest that is subject to levy and sale under execution; *to support the execution, the debtor must have a beneficial interest in the property. Where the debtor has only a naked legal title in trust for others, he has no interest in the property that may be seized and sold under execution,* no matter how completely he may have exercised apparent ownership over it, unless credit was given him on the faith of such ownership."

In the light of the concluding language of the foregoing quoted matter it should be noted again that, at the time the indebtedness here was incurred (now merged in judgment) the Appellee, as alleged in the complaint of intervention:

> "Well knew that the said Teton Co-Operative Reservoir Co. was the instrumentality and agency through and by which the Bynum Irrigation District supplied water for irrigation purposes to the lands in the said district and that the said district had no other means of supplying water to the same." (Tr. 68.)

Upon the same page of the transcript it is further alleged that the Appellee also then and there knew all the other facts and circumstances set forth and alleged in the complaint of intervention of the Appellants, Ackroyd, et al.

Controlling and leading cases that support the rule of the American Jurisprudence reference, supra, are as follows, to-wit:

Smith v. McCann, 24 How. 398, 16 L. Ed. 714;
Townsend v. Greeley, 5 Wall. 326, 18 L. Ed. 547.

In *Smith v. McCann,* supra, paragraph 5 of the syllabus of the law edition report reads as follows, to-wit:

> "It is not every legal interest that is made liable to sale on a fi.fa.; the debtor must have a beneficial interest in the property."

In the *Townsend* case, supra, certain lands were held in trust for the inhabitants of a municipality. The court said:

> "Trust property, thus held, is not the subject of seizure and sale under judgment and execution against the trustee, whether that trustee be a natural or an artificial person."

Other authorities to the same effect are as follows:

23 *C. J.,* Executions, Par. 83;
17 *R. C. L.,* Levy and Seizure, Par. 22, page 125;
Sapero v. Neiswender (C. C. A. 4), 23 Fed. (2d) 403 and 406;

Princeton Mining Co. v. The First Nat'l Bank of Butte, et al., 7 Mont. 530 and 539.

We have here, in Teton Co-Operative Reservoir Co., the type of corporation involved in *Pacific States Savings and Loan Corporation v. Schmitt, et al.* (C. C. A. 9), 103 Fed. (2d) 1002. The point presented here was not involved in the *Schmitt* case. But this court has pointed out in that case that such a corporation as Teton Co-Operative Reservoir Co. here acts "as the agent of its stockholders in the diversion and storage of water to be applied to beneficial use upon their lands". It acts in a fiduciary capacity. Thus, upon principle, the *Schmitt* case makes the doctrine of *Smith v. McCann,* and the other authorities, supra, applicable in the case at bar.

But a case directly in point is that of *Eldredge v. Mill Ditch Co. et al.* (Ore.), 177 Pac. 939. In that case Mill Ditch Co. was a corporation organized for the purpose of diverting water from the Malheur river and distributing it through its ditches to its stockholders in proportion to the shares of stock held by each stockholder. Each of those shares, as in the case at bar, represented the right to a certain amount of water. The U. S. National Bank had a judgment against Mill Ditch Co. It levied execution upon the property of that company, which included its water and ditch rights, and sold the same. Thereupon the Eldredge action was brought to set aside the execution sale and to bring about the levy of necessary assessments to pay the debts of the Ditch Company. The Oregon Court in the *Eldredge* case specifically applies

the rule that equity will not permit the levy of an execution upon a legal title held by a debtor as trustee for a third party, and says:

> "A court of equity would look to the interest of the real beneficiaries and would not permit them to be uselessly embarrassed by the sale of the legal title held by the debtor."

The court also points out in the *Eldredge* case that property which is so involved with the interest of the public that it cannot be levied upon and sold without interfering with the rights of the public is not subject to levy and sale under execution. The court says in this connection:

> "Such are the interests of corporations like canals and railroads, even when in some sense held by private corporations, and the interests held by a school district and other public and quasi public organizations."

The case of *Gue v. Tidewater Canal Co.*, 24 How. 257, 16 L. Ed. 635, is relied upon as a leading case to support the doctrine. There a judgment creditor of the canal company, a great thoroughfare of trade, caused an execution to be levied upon a house, a lot, a wharf and canal locks belonging to the canal company. A bill was filed on the equity side of the court to enjoin the execution sale, and the action of the lower court in granting a perpetual injunction was affirmed upon appeal.

After considering in the *Eldredge* case all of the foregoing principles the Oregon court then says:

"It seems that all of these questions enter more or less into this case, and all are reasons why the property of this mutual water company held and used for the purpose of transmitting and delivering water appropriated by them, and used upon their respective land, ought not to be permitted to be sold upon an execution against the water corporation.

It seems to be pretty well settled, in the states having water codes similar to that of our own state, even in cases of public service corporations organized for profit and selling water to the general public, that the water and ditch rights really belong to the individual appropriator and are appurtenant to the lands upon which the same are used, and that the corporation transmitting the same is in the nature of a holding company or agent for the true owners of the water rights. Weil on Water Rights (3d Ed.) vol. 2, Par. 1339, p. 1237, and authorities cited.

How much more so must this be true in the case of a mutual water company, not organized for the purpose of selling water or as a profit corporation, but for the sole purpose of transmitting and delivering to the appropriators and owners of the water the quantity to which each is entitled. *The relation here on the part of the corporation seems to be clearly that of a holding company, trustee, or agent for the real owners of the water who are putting it to a beneficial use upon their lands. It would seem clearly that the corporation in such a case had no interest in the water or ditches which equity would permit it to sell and transfer to outside parties, and thereby*

deprive the water users of the same, and, if this could not be done by private contract, it certainly could not be done by an involuntary sale under execution.

The sale in question could work no useful purpose, but would practically destroy the entire property, and embarrass and hinder the owners of the water and perhaps prevent them from obtaining it, at all."

The judgment of the lower court, which sanctioned the execution sale against the Mill Ditch Co., was accordingly reversed. The concluding language of the court in the *Eldredge* case is pertinent:

"In this case it would be a calamity, to that portion of the public represented by the water users under the ditch, if such ditch could be closed and their water rights destroyed and transferred by such an execution sale; and the whole community would be more remotely affected, since they are dependent upon these (and others like them) for the production of the necessities of life. May it not well be that such water-serving corporations are as public in their purposes and as closely interwoven with the public interest as a small village or a school district on the one hand, or as a canal company considered in Gue v. Tide Canal Co., already cited; and therefore not subject to execution against their property?"

An application of the principle of the *Gue* case, cited in the *Eldredge* case, is found in *Northern Pacific Ry. Co. v. Schimmell,* 6 Mont. 161, 9 Pac. 889. There the court held that an office safe at a railroad

depot, in which the railroad agent deposited receipts of money and valuable papers, facilitates the operation of the railroad and cannot be seized on execution against the company because of the interest the public has in the continuance of the operation of the railroad.

The foregoing argument, and the controlling authorities considered and discussed therein, establish, without more, that the Appellee is without right to levy upon the real estate involved in the suit at bar.

III.

NEITHER LEVY UPON NOR SALE UNDER EXECUTION OF THE REAL ESTATE INVOLVED HERE MAY BE MADE BECAUSE OF ITS PUBLIC CHARACTER AND NECESSARY USE FOR PUBLIC PURPOSES.

The public character and public use of the real estate which the Appellee threatens to sell under execution has been established by argument, supra. Again we emphasize in this connection the following allegations of the complaint of intervention of the Appellants Ackroyd, et al., which have been admitted, viz.:

> "That the said capital stock of the said Teton Co-Operative Reservoir Co. so purchased, as aforesaid, constitutes and is the sole source of water supply for the said Bynum Irrigation District and is indispensable, in its entirety, to the conduct of the business of the said Bynum Irrigation District as a public corporation of the State of Montana." (Tr. 55 and 56.)
>
> "That in the conduct of its business the said company (meaning Teton Co-Operative Reservoir

Co.) has acquired and now owns and holds real estate in Teton County, Montana; that it has constructed improvements thereon consisting of the said reservoir, embankments for the same, dams, headgates, canals, and other necessary structures for the proper diversion, impounding and distribution of waters for irrigation purposes, and that all of the said real estate is needed by the said company for the conduct of its business; (Tr. 63.)

"That the said Winston Brothers Co. further claims the right, under the said judgment, to levy upon the said real estate by writ of execution and to cause the same to be sold at sheriff's sale and to deprive the said Teton Co-Operative Reservoir Co. and the said Bynum Irrigation District of the said property, all of which said property is indispensable * * * to the operation of the said Bynum Irrigation District as a public corporation and to the delivery of waters for irrigation purposes to the land in the said district."

It is the contention of the Appellants Ackroyd, et al. that the real estate involved here may not be sold under the judgment obtained by the Appellee because of its public character and public use, and this for two reasons, to-wit: *First,* the statutes of Montana do not authorize the sale under judgment of public property necessarily used for public purposes; and, *Second,* it is against public policy to allow such property to be sold under judgment and to thus disrupt the affairs of a public corporation or make it impossible to function

as such. These two contentions will be discussed together under this subdivision of the argument.

Section 9410, Revised Codes of Montana, 1935, provides that after a judgment has been docketed:

> "It becomes a lien upon all real property of the judgment debtor not exempt from execution in the county, owned by him at the time, or which he may afterward acquire, until the lien ceases. The lien continues for six years, unless the judgment be previously satisfied."

The execution statute is Section 9416, Revised Codes of Montana, which provides that the party in whose favor a judgment was given may at any time within six years after the entry thereof have a writ of execution issued for its enforcement.

It is upon these statutes that the Appellee relies not only for a lien upon the real estate involved but to support its claim that the said real estate may be sold under execution. Neither statute, it will be noted, nor any other Montana statute, provides that the judgment lien attaches to public property necessarily used for public purposes or that such property may be sold in satisfaction of a judgment. The said statutes, and all appurtenant statutes, are general statutes, and no intention has been manifested thereby, either in express language or by implication, that public property necessarily used for public purposes shall be comprehended by the statutes.

It is a general rule of law as declared in 59 *Corpus Juris,* Statutes, Par. 653, page 1103, that:

"The state and its agencies are not to be considered as within the purview of a statute, however general and comprehensive the language of such act may be, unless an intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication."

And in 19 *R. C. L.,* Municipal Corporations, Par. 339, the rule is stated to be:

"It is well settled that when a creditor has secured judgment against a municipal corporation, and taken out execution, he cannot levy upon property of the corporation which is devoted to public uses * * *. This rule is based upon obvious principles of public policy, and is not a peculiar or special privilege of municipal corporations."

In 5 *American & English Annotated Cases,* Note, Page 512, it is said:

"According to the weight of authority, the general rule is that property of a quasi-public corporation, essential to the discharge of those public duties for which it is created, is not subject to levy and sale on execution in the absence of statutory provisions to that effect."

Other general authorities to the same effect as above are as follows, to-wit:

McQuillin Municipal Corporations, Vol. 3, Par. 1160, and Vol. 5, Par. 2500;

17 *R. C. L.,* Levy and Seizure, Par. 43;

23 *Corpus Juris,* Executions, Par. 105;

59 *Corpus Juris,* Statutes, Par. 653;
Lewis' Sutherland Statutory Construction, 2nd Ed., Vol. 2, Par. 514;
21 *Am. Jur.,* Executions, Par. 457.

The remedy to be applied by the Appellee here is pointed out in *U. S. ex rel. Masslich v. Saunders, et al.* (C. C. A. 8), 124 Fed. 124 and 126, where the court says:

> "In the enforcement of judgments of the national courts against municipal and quasi municipal corporations, the writ of mandamus is the legal substitute for the writ of execution to enforce judgments against private parties. The plaintiff in a judgment of the former class has the same right to the issue and enforcement of a mandamus commanding the proper officers of the defendant corporation to make suitable provision for its payment that the plaintiff in a judgment of the latter class has to the issue and enforcement of a writ of execution."

In the controlling case of *Walkley v. City of Muscatine,* 6 Wall. 481, 18 L. Ed. 930, the court held that where a judgment against a city was not paid the appropriate remedy was by writ of mandamus.

Some of the general principles here involved were settled by this court in *California Iron Yards Co. v. Commissioner of Internal Revenue* (C. C. A. 9), 47 Fed. (2d) 514.

A controlling case also that settles *all* of the principles invoked by the Appellants, Ackroyd, et al. is

that of *Whiteside v. School District No. 5, et al.,* 20 Mont. 44, 49 Pac. 445. There Judge Hunt, later a member of this court, held, as declared by Par. 1 of the syllabus in the Montana Report, that:

> "Inasmuch as the law which provides for liens of mechanics does not expressly provide for a lien upon school and other buildings such buildings are not subject to the lien of a subcontractor."

We quote from the decision as follows, to-wit:

> "Most of the decisions base their reasoning upon the ground of public policy, and point out that it is easy to see what detriment might follow if lands and buildings held for public uses—as, for instance, common schools—could be sold to satisfy the debts or defaults of municipal corporations having the legal title.
>
> In the California case cited above the court invoked the general doctrine that 'the state is not bound by general words in a statute which would operate to trench upon its sovereign rights injuriously affecting its capacity to perform its functions or establish a right of action against it', and the court applied the familiar rule of construction heretofore cited by holding that *by the omission in the statute to mention public buildings it was manifest from the whole statute of that state that they were not included.*
>
> We believe that under the statute of this state, construing it according to the rule laid down in the foregoing cases, it was not intended to give to a mechanic who is a sub-contractor a lien for work done or materials furnished in the construc-

> tion of a public school house. The omission of the express right to a lien upon such a building and property shows that it was not intended to be included within the provisions of the law for reasons of public policy. It is evident that the legislature did not mean to disturb this almost universal rule of statutory construction."

The *Whiteside* case, supra, and the principles settled thereby were not considered by the lower court in its decision. (Tr. 84 and 85.) It is the contention of the Appellants Ackroyd, et al. that the *Whiteside* case, without more, is controlling and decisive here. The rule of that case has not been departed from in Montana in any subsequent decision.

In *State v. Blake* (Utah), 20 Pac. (2d) 871, the court held that the property of a drainage district may not legally be taken from the district under writ of execution, but that the remedy is by mandamus.

In *People v. San Joaquin Valley Agricultural Assn., et al.* (Cal.), 91 Pac. 740, the court held that an agricultural association organized for the purpose of holding products of a certain territory of the state is a public corporation created for the local administration of the affairs of the state and that its property is not subject to execution although the statute creating the association authorizes it to sue and be sued.

In *Sherman County Irr. & Water Power & Improvement Co. v. Drake, et al.* (Neb.), 91 N. W. 512, the company was a quasi-public corporation organized

to construct a work of internal improvement, namely, a canal for irrigating and power purposes. Drake recovered a judgment at law against the company and levied an execution upon the flume and part of the right-of-way of the company, whereupon an action was brought to perpetually restrain the enforcement of the execution levy. The court held "in accordance with the general voice of judicial authorities", namely:

> "In the absence of statutory enactment, the property of quasi public corporations, like the plaintiff, cannot be seized and sold upon process in actions at law."

As stated previously herein the case at bar is not one in which the Appellants Ackroyd, et al. claim *exemption* from execution of the real estate involved. On the contrary their claim is that no authority of law can be found in any statute of Montana for either a lien upon such public property by judgment or for a sale thereof under execution.

CONCLUSION.

Regardless of the form the transaction has taken it is plain that the investment by Bynum Irrigation District in the stock of Teton Co-Operative Reservoir Co. was for the sole purpose of obtaining a water supply that was actually needed by the district for purposes of irrigation. It acquired such water supply, that was so necessary to enable it to operate as a public corpo-

ration, when it took over, in effect, Teton Co-Operative Reservoir Co., and, through ownership of 80.4% of the capital stock of that Company, put the district, through its district commissioners, in a position to control the works of irrigation of the said Company and the distribution of water.

A court of equity will hardly give serious consideration to a claim that, under such circumstances, the property held by Teton Co-Operative Reservoir Co. and necessarily used as part of the irrigation system, can be levied upon under judgment and sold under execution as the property of an ordinary debtor and Bynum Irrigation District be thus deprived of its sole source of water supply so that it can no longer function as a public corporation. "Equity regards substance rather than form." And such a claim should be particularly obnoxious in a court of equity, that requires those who enter its portals to come with clean hands, when consideration is given to the fact that the Appellee, who has made such claim heretofore, knew, from the first, the status of Teton Co-Operative Reservoir Co. and its exact relation to Bynum Irrigation District. Thus the Appellee also knew, for it was charged with knowledge of the law, that claims and demands cannot be enforced, by lien or levy, against public property necessarily used in the conduct of the business of a public corporation.

The lower court plainly erred in granting the motion to dismiss and in rendering judgment accordingly. That judgment should be reversed with direc-

tions to enter judgment for the Appellants as prayed for in their bills.

Dated, Billings, Montana,
September 27, 1939.

Respectfully submitted,
STERLING M. WOOD,
ROBERT E. COOKE,
FREDRIC MOULTON,
By STERLING M. WOOD,
Attorneys for Appellants, James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens, and Frank E. Nelson.